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Ethics, Gag Rules, and Title X

by

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The U.S. Supreme Court has ruled, in *Rust v. Sullivan*, that regulations promulgated by the Reagan and Bush Administrations requiring Title X funds recipients not to counsel or make referrals for abortions, were constitutional. Critics of the rules, led by Planned Parenthood (whose financial stake in overturning the regulations is substantial), branded the provisions as "gag rules," violating "medical ethics." The regulations, they claimed, impinged on the physician-patient relationship, depriving women of "all the medical information" to which a woman is entitled and, hence, unethical. The purpose of this essay is to examine the charge of violation of "medical ethics" by the Title X rules.

The Hippocratic Oath reads in part:

I will give no deadly medicine to any one if asked nor suggest any such counsel, and in like manner I will not give to any woman a pessary to produce abortion.¹

The Oath bars a physician from inducing death. Notably, it not only forbids *causing* death but it also bars *counselling* such a course. The life orientation of the Oath is clear: the physician is not to prostitute his art by dealing death. The Hippocratic physician is literally a sworn enemy of death. He may not bring about his patient's death nor may he advocate death as a form of treatment.

The Oath immediately links this prohibition about administering "deadly medicine" or counselling such as a course with abortion: "*in like manner* I will not give any woman a pessary to produce abortion" (emphasis added). The Hippocratic physician is one who regards abortion as a prostitution of the doctor's art.

Thus, the Oath which formed the cornerstone of Western medical practice, the symbolic touchstone of medical ethics, supplies three points relevant to *Rust*: (i) it explicitly bans abortion; (ii) it clearly forbids doctors to cause death; and (iii) it expressly prohibits counselling death. The position of the Hippocratic Oath, of course, collides with the conclusions of the Supreme Court in *Roe et al. v. Wade*, which is why Justice Blackmun goes out of his way in the opinion to insist that the Hippocratic tradition was one of many different approaches to medical

ethics in its day: for Blackmun, the pluralism of medical traditions allows him to circumvent the clear requirements of the Oath. A bevy of ethics, of course, does not answer the *ethical* question of which one is *right*, but Blackmun apparently banked on the dominance of ethical relativism in contemporary American culture to respond to that ethical question with an agnostic stare. In case anybody still had some lingering nostalgia for the Hippocratic tradition, however, Blackmun tries to tar it with guilt by association: Christianity played a part in its spread and prevalence. Certainly any ethical system which came to prevail with some assistance from the Church, especially when such prevalence wiped out contradictory ethical systems (like the "progressive" Roman *potestas patriae*) must in some sense be importing religion impermissibly into the public forum. From here it is but a short step to reading Congressman Henry Hyde's mail in search of religious comments which might "prove" that the Hyde amendment's ban on Medicaid abortions is really just an imposition of religious doctrine in the secular realm.

Hippocratic Tradition to the Periphery

The marginalization of the Hippocratic tradition, especially in the past two decades, is directly correlated with the fact that doctors who are faithful to that tradition are not abortionists and do not build "death machines." Nor is it coincidental that, as the Hippocratic tradition has been progressively relegated to the periphery, a plethora of books, journals, conferences, seminars, etc. on "medical ethics" and "bioethics" has inundated medicine and the academy. What is appealing about so many of the contemporary approaches is that, after the obligatory handwringing and anguishing, an "ethicist" will eventually come along who will "sign off" on just about anything one wants to do.

Is this author being unjustifiably uncritical in this last comment? No, because so much of contemporary "bioethics" is form without substance. Underlying many such approaches is a Kantian preoccupation with procedure. Once one follows through on the procedure one has done the ethical. This is one of the problems behind the struggle over *Rust*. The anomaly is that those who claim that the Title X rules are unethical are precisely the same people who consciously refuse to let the debate about whether *abortion* itself is ethical enter the picture. They want to confine the argument to procedures about recommending/referring for abortions, but avoid at all costs morally evaluating *what* is being recommended or referred for.

Some bioethicists may propose additional criteria to the procedural but their tests, usually variations on some sort of utilitarianism, emotivism, or consequentialism, have built-in proclivities to dovetail with the subjective conclusions preferred by the procedural partners. Given the intellectual skepticism about whether there are objective goods/values, and whether these goods/values are objectively knowable, one is led back to the same ethical relativism Blackmun relies upon in dismissing the Hippocratic tradition: confronted with a plurality of contradictory ethical approaches, canonizing one of them is impermissible. Of course this does not answer the question "what is

right?" It evades it. But evading the central question of abortion has characterized the opponents of *Rust* from the beginning.

The Hippocratic Oath becomes an embarrassment for some precisely because its ethics are not only formal but substantive: it not only requires the physician to act "for the benefit of my patients" but also specifies *a priori* what is beneficial and what is baleful for those patients. Many physicians, even the Planned Parenthood plaintiffs in *Rust*, could subscribe to the Hippocratic stipulation that "I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischevous." Where the problem arises is when a medico-ethical tradition puts flesh on those bones, indicating, e.g., that abortion or death counselling is "deleterious and mischevous."

One other element of the Hippocratic tradition which causes it to run afoul of some contemporaries is its focus on the physician as ethical agent. The *physician* determines what is beneficial and what is detrimental in treatment. The *physician* is not to cause or recommend death. The *physician* is not to induce abortion. Critics of the Hippocratic tradition brand it paternalistic: doctor knows best. They claim that the patient is passive, not a partner in medical decisions.

Now certainly any competent physician knows that the intelligent cooperation of one's patient is an important element in health care. Medicine, law, and ethics all recognize the critically important role of informed consent. The day when patients submissively adhered to doctor's instructions without questioning, if it ever existed, is past and rightly so. Nevertheless, a partnership between patient and physician does not mean that the latter should forego his professional ethics to meet the desires of the former. For Hippocrates, medicine is an art, not a consumer service. It demands professional judgment, including professional ethics, and not just servicing of patient's wishes. One has only to compare this perspective with the contemporary situation. Modern gynecology has, to a great degree, degenerated into wish fulfillment quite apart from any real notion of "healthy and normal" vs. "abnormal and pathological."² The idea of "institutional conscience," the right of hospitals, nursing homes, and other health care facilities to set ethical standards in their patient care, is under strong attack, especially as regards performing abortions or removing feeding tubes.³ The assault is particularly strong on public institutions. The 1991 Maryland abortion act, for example, leaves real question about the degrees of institutional and personal conscience left in that state. Some "feminist" critics of *Roe et al. v. Wade*, for example, fault the decision for seeming to connect the right to privacy more with the physician-woman relationship than with a woman's absolute "right" to choose abortion, with a physician merely to carry her choice into effect. It is this absoluteness of choice that fuels the campaign for importing RU-486 into the United States and, though the drug's regimen requires medical supervision, one can imagine some sectors of the "women's" movement that may press for the drug's availability "on demand."

Medical Ethics

The entire discussion up to this point should indicate one thing: one cannot say without qualification that *Rust v. Sullivan* violates "medical ethics." In fact, it comports with one of the most central medico-ethical traditions of the West. (We have not even discussed its clear conformity with the Catholic medico-ethical tradition, a clearly significant one since it was the Church that gave birth to hospitals and which has been involved in health care throughout much of its history). What *Rust* violates is one particular school of medical ethics, a very modern one, one which lacks any definitive norms of practical and particular right and wrong, one which puts its accent on procedure and on meeting customer preference. It is a tradition far removed from the formative influence of the Hippocratic Oath.

What is paradoxical about this new medical ethic is, however, its implicit desire to be normative. Critics of Hippocrates seek to dismiss his tradition by arguing that it was one ethic among many. Critics of Catholic medical ethics—including some self-styled theologians—argue in favor of gutting specific prescriptions and proscriptions, e.g., of the "Ethical and Religious Directives for Catholic Health Facilities," in the name of "pluralism."⁴ Modern moral relativism claims that there is no one, objective, normative good and, even if there is, we cannot know it. Amid all these claims about diversity and pluralism and relativity, however, opponents of *Rust* claim that "medical ethics" are violated by the Title X "gag rule." Such claims leave the impression that no system of medical ethics is reconcilable with *Rust*, something shown here to be untrue. Hippocrates "gagged" his physicians in the name of ethics over two millennia ago. Such claims also suggest that the "medical ethics" invoked by *Rust's* opponents are normative, universal, and controlling, claims in utter contradiction to the very principles upon which this new ethic lies. Everything is relative—except my claim that everything is relative.

A final thought: opponents of *Rust* maintain that they are only demanding that the flow of information between doctor and patient not be impeded. "Women should get all the facts." The sincerity of such people would be more credible if many of the same parties fighting the Title X rules were not the same ones who convinced the Supreme Court, in its 1986 *Thornburg* decision, to strike down a Pennsylvania law requiring that women be given the biological and medical facts about fetal development and what happens in an abortion before one is performed. Pennsylvania argued that women deserved all the facts about abortion; the abortionists said that would be "distressful propaganda." That came from the same people who would like Congress to enact their one view of medical ethics into law and thereby allow the real propagandists to continue their lucrative enterprise with the taxpayer's dollar.

References

1. All quotations to the text of the Oath are from *Encyclopedia Americana*, 1991 ed., s.v. "Hippocratic Oath" by J. B. de C. M. Saunders.

2. John Boyle, ed., *Creative Love: The Ethics of Human Reproduction* (Front Royal, VA: Christendom Press, 1989).

3. See e.g., John M. Grondelski, "A Dilemma for Institutions with Consciences," *America* 158 (27 February 1988), no. 8: 213-15.

4. See "Catholic Hospital Ethics: The Report of the Commission on Ethical and Religious Directives for Catholic Hospitals Commissioned by the Board of Directors of the Catholic Theological Society of America," in John F. Dedek, *Contemporary Medical Ethics* (Kansas City, KS: Sheed, Andrews, and McMeel, 1975), pp. 173-200.
